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No. 94-1819

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, JAMES B. CULLEN, CHRISTINE MARIE ODELL, STEVEN GAWLEY, DANIEL ALTMAN, PHILIP JAY BOTWINIK, JEFFREY S. ZELLAN, JACLYN BERNSTEIN, GLEN MAGPANTAY, WILLIAM WEITZ, COREY ANTHONY, DIEGO MUNOZ, EDWARD FAGAN, BAYCAN FIDELI, JODIE GREEN and JEFFREY LUKS,

Petitioners,

v.

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, and CLIFTON R. WHARTON, JR., individually and as Chancellor of the Board of Trustees, and THE STATE UNIVERSITY OF NEW YORK COLLEGE AT CORTLAND, and JAMES M. CLARK, individually and as President of the College at Cortland, and THE STATE UNIVERSITY OF NEW YORK AT BINGHAMTON, and CLIFFORD D. CLARK, individually and as President of the State University of New York at Binghamton, and THE STATE UNIVERSITY OF NEW YORK AT ALBANY, and VINCENT O'LEARY, individually and as President of the State University of New York at Albany, and THE STATE UNIVERSITY OF NEW YORK COLLEGE OF ARTS AND SCIENCES AT POTSDAM, and HUMPHREY TOMKIN, individually and as President of the College of Arts and Sciences at Potsdam,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENTS' REASONS FOR DENYING THE WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The SUNY Respondents apparently have concluded that they cannot effectively meet and rebut Petitioners' carefully constructed arguments and contentions, thoroughly supported in their Petition for Writ of Certiorari by citations to critical cases in this Court and the courts of appeals.

Thus, their strategy has been to ignore this Petition and present a host of new arguments, frequently unsupported by the cases cited, or without any case authority at all, and thereby seek to divert attention from the inherent weakness of their position.

Unfortunately, neither time nor space will permit a page by page documentation of such serious charges. However, we respectively submit that this will become apparent from the comments below, and a careful comparison of Respondents' Brief in Opposition to the positions developed in the Petition for Writ of Certiorari.

Essentially, Respondents make two fundamental points that, as this Reply Brief points out, are unsupportable and wrong:

- First, **by ignoring all of the material and a host of citations from** pp. 8 through 22 of the Petition for Writ of Certiorari, Respondents make the simplistic, unsupported argument at page 8 of their brief that **"the confusion and conflicts plaintiffs purport to detect . . . are simply nonexistent."**

- Second, that a condition of mootness is so **fundamentally jurisdictional, grounded as it is in Article III**, that it brooks no exceptions; -- and that when a case lacks viable plaintiffs, with a legal stake in the outcome, it is moot; and **no court, including this Court, has the jurisdictional power to take any action** (by way of amendment, adding new parties, or

otherwise) to infuse new life into an otherwise dead case to permit a final resolution on the merits.[1]

1. Respondents Erroneously Contend That There Is No Confusion Or Conflict In The Caselaw On The Application Of The Mootness Defense

A. *Respondents Fail to Address Caselaw Cited Throughout Petitioners' Brief that Illustrates the Conflict and Confusion on the Application of the Mootness Doctrine*

Respondents contend that there is no conflict or confusion regarding the application of the mootness doctrine, and that any disagreement that does exist is simply an academic debate among law professors. Respondents' contention, however, is simply unsupported by the extensive caselaw discussing the proper application of the mootness doctrine. This caselaw, from this Court as well as from the Circuit Courts below, illustrates that the debate concerning the proper application of the mootness doctrine is ongoing and far from resolved.

Respondents have disingenuously responded to only one side of the debate and seek to mislead this Court that no confusion exists:

- They have failed to respond to or distinguish Petitioners' arguments regarding the "prudential" nature of the mootness doctrine and the many cases cited by Petitioners that have recognized this flexible approach, such as *United States Parole Commission v. Geraghty*, 445 U.S. 388, 404-06 & n.11 (1980) and *Honig v. Doe*, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring) and its progeny.

- They fail to address in depth *Honig v. Doe*, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring), particularly Mr. Chief Justice Rehnquist's discussion of the mootness doctrine in his concurring

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1 As developed below, Mr. Justice Scalia, writing for a unanimous court in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 389-90 (1994), perceptively addresses this very issue. There, this Court definitively and conclusively rejects SUNY's contention, holding that appellate courts have, and must have, power to take appropriate action, other than making a decision on the merits, with respect to a moot case.

opinion, which is discussed at pp. 11-13 of Petitioners' brief. Mr. Chief Justice Rehnquist stated that mootness "may be overridden where there are strong reasons to override it," and argued that in certain situations the mootness doctrine should be abandoned altogether or relaxed. *Honig*, 484 U.S. at 331 (Rehnquist, C.J., concurring).

- They instead focus only on student cases that became moot when the students graduated. The underlying issues discussed in Petitioners' brief, however, transcend student cases.

- They have chosen to ignore the issues addressed by Petitioners at pp. 16-22 of their brief regarding the conflict among the Justices of this Court and the Circuit Courts as to the competing views of the application of mootness doctrine; -- and have chosen to address only one of these approaches, ignoring caselaw from this Court and the Circuit Courts below that recognize and discuss these alternative approaches.

- They totally ignore two very important decisions from the Second and Sixth Circuits that recently have questioned the appropriate application of the mootness doctrine. *See:*

  - *Heldman v. Sobol*, 962 F.2d 148, 154 n.7 (2d Cir. 1992) (noting that members of this Court and commentators have questioned nexus between mootness doctrine and Article III);[2] and

  - *Kellogg v. Shoemaker*, 46 F.3d 503, 507 (6th Cir. 1995) (summarizing Article III-based and prudential-based views of mootness doctrine), *petition for cert. filed*, No. 94-9509 (May 30, 1995).

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2 *But see Christopher P. v. Marcus*, 915 F.2d 794, 803-04 (2d Cir. 1990) (which reached opposite conclusion from *Heldman* in similar factual scenario involving mootness of claims brought by handicapped children no longer enrolled in defendant school), *cert. denied*, 498 U.S. 1123 (1991).

B. *Caselaw Cited by Respondents Has Not, As Respondents Contend, Resolved the Conflict and Confusion in the Courts*

Rather than address Mr. Chief Justice Rehnquist's arguments in *Honig*, Respondents contend at pp. 9-10 of their brief that two opinions of this Court subsequent to *Honig* have cleared up any confusion concerning the doctrine's application. *See*:

- *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990); and
- *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994).

Most emphatically these two opinions do not resolve the confusion in this Court or in the Circuit Courts regarding the mootness doctrine. Furthermore, both cases recognize as Petitioners contend the Court's power to take appropriate action in a moot case:

- First, neither case discusses *Honig* or even cites to this opinion.
- Second, neither case addresses the mootness debate and the differing approaches to its application.
- Third, in both cases, the Court affirmed its power to act once it had determined that Article III's requirements were no longer met.

In *Lewis*, the Court vacated the judgment of the appellate court and remanded the case to permit the parties to amend the pleadings or further develop the record. *Lewis*, 494 U.S. at 482.

In *Bancorp*, the issue before the Court was whether the Court had the power to entertain a motion to vacate a judgment after a settlement between the parties that rendered the case moot. *Bancorp*, 115 S. Ct. at 389. The Court's passing references to Article III were made, not in the context of a discussion of the mootness doctrine, but as dicta to discuss the Court's powers *after* a determination of mootness had been reached.

Mr. Justice Scalia, writing for a unanimous Court in *Bancorp*, stated that

> reason and authority refute the quite different notion that a federal appellate court may not take any action with regard to a piece of

litigation once it has been determined that the requirements of Article III no longer are . . . met.

Bancorp, 115 S. Ct. at 389.

Mr. Justice Scalia noted that "Article III does not prescribe such paralysis," for "'[i]f a judgment has become moot [while awaiting review], this Court may not consider its merits, **but may make such disposition of the whole case as justice may require.**'" *Id.* at 390 (quoting *Walling v. Reuter Co.*, 321 U.S. 671, 677 (1944) (emphasis supplied)).

Despite Respondents' claims to the contrary, recent appellate court decisions demonstrate the **persistent confusion** regarding the appropriate application of the mootness doctrine:

- In *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 1822 (1995), discussed in Petitioners' brief at p. 18, the Sixth Circuit refused to dismiss an action in response to claims of mootness. Petitioners' case is indistinguishable from the facts in *Washegesic*, in that Petitioners, could return as visitors just like the student in *Washegesic*, at which point Petitioners would be subjected to the same unconstitutional regulation that they originally challenged at the outset of this litigation.

- In *Kellogg v. Shoemaker*, 46 F.3d 503 (6th Cir. 1995), *petition for cert. filed*, No. 94-9509 (May 30, 1995), discussed in Petitioners' brief at p. 9, the Sixth Circuit at the outset noted the confusion and controversy surrounding the mootness doctrine and refused to render plaintiffs' claims moot.

C. *Respondents Fail to Address Caselaw Cited in Petitioners' Brief that Illustrates the Flexibility Inherent in the Mootness Doctrine When "Significant Constitutional Issues Are at Stake"*

Incredibly, Respondents' brief ignores and fails to even discuss *United States Parole Commission v. Geraghty*, where this Court stated that the mootness doctrine is flexible and "riddled with exceptions." 445 U.S. 388, 404-06 & n.11 (1980). As discussed at pp. 13-16 of Petitioners' brief, in

creating each exception to the mootness doctrine, the Court "has looked to practicalities and prudential considerations." *Id.*

Similarly, and surprisingly, Respondents make absolutely no effort to distinguish the caselaw cited on pp. 13-16 of Petitioners' brief to support the position that this Court has adopted a flexible approach to the mootness doctrine when **"significant constitutional issues are at stake."**

2. Respondents Are Wrong In Contending That Mootness Destroys Petitioners' Right To Amend; And That Being Jurisdictional It Brooks No Exceptions

SUNY throughout its brief (*see* pp. 10-11, 17-19, citing *Bancorp* at p. 18, and at pp. 20-21, citing *Princeton University v. Schmid* at p. 21) contends in effect that a moot case is a dead case that cannot be revived by substituting new parties.

As noted in Section 1 above, Respondents' reliance on *Lewis* and *Bancorp* for this proposition is disingenuous because these cases make it absolutely clear that even in a case designated by the Supreme Court as "moot," the Court still has the power to take appropriate action, which it did in both cases, to correct the mootness in order to permit a resolution of the issues on the merits.

Surprisingly, in making the argument that a court is powerless to permit amendment of a moot case, Respondents fail to cite to, distinguish or otherwise rebut Petitioners' position at p. 27 of their brief in which Petitioners rely heavily on this Court's decisions in *Mullaney v. Anderson*, 342 U.S. 415 (1952) and *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990).

In *Mullaney*, this Court permitted an amendment similar to that which Petitioners seek here: i.e., to remedy the mootness issue and permit substitution of new plaintiffs (union members) for a plaintiff (the union) that did not have standing to sue. Thus, prior to the substitution of the new parties in *Mullaney*, there was no legally viable plaintiff before the Court. Nevertheless, the Court permitted an amendment of parties to reinstate the Court's power to resolve the merits. This Court's reasoning, which is cited in Petitioners' brief at p. 27 and restated here, was that

> to dismiss the present petition and require new plaintiffs to start over in the district court would entail needless waste and run counter to effective judicial administration.

Mullaney, 342 U.S. at 417.

Additionally, Respondents fail to discuss a leading decision by this Court that follows *Mullaney*. In *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 836-37 (1989), this Court ruled squarely against Respondents' position that a moot case is a dead case that cannot be revived, holding that Rule 21 of the Federal Rules of Civil Procedure gave the Court the inherent power to deal with issues involving the joinder of new parties, even if the joinder was designed to correct jurisdictional defects.

The Court explained that it would not disturb that "deeply rooted understanding" of a court's power, "particularly when requiring dismissal after years of litigation would impose **unnecessary and wasteful burdens on the parties, judges and other litigants waiting for judicial attention**." *Id.* at 836. (emphasis added) Moreover, the Court aptly noted Judge Posner's eloquent statements in the lower court in *Newman-Green*

- that "law is an instrument of governance rather than a hymn to intellectual beauty" and
- that plaintiff "should not be compelled to jump through [such] judicial hoops merely for the sake of **hypertechnical jurisdictional purity**."

Id. at 837 (emphasis added) (quoting *Newman-Green v. Alfonzo-Larrain*, 854 F.2d 916, 925 (7th Cir. 1988) (Posner, J.)).

Furthermore, Respondents' reference on p. 21 of their brief to this Court's decision in *Princeton University v. Schmid* is inexcusable and outrageous advocacy, suggesting that this case supports the inability of federal courts to permit amendment of a moot case. This case most emphatically

does not so hold. In *Princeton*, this Court held simply that the case was moot because the regulation at issue had been substantially amended.[3]

In the instant case, and unlike the *Princeton* case and several others cited in Respondents' brief, the issues, as developed in Section 3 below, are still very much alive. These issues continue to impact all students at all of the 32 residential SUNY campuses in the statewide university system.

3. This Case Is Not, As Contended By Respondents, Solely About Attorneys' Fees. Rather, It Is A Genuine Representative Action To Correct An Egregious Wrong By Respondents That Continues To This Day To Violate The Fundamental Constitutional Rights Of All Students Enrolled At All Of The 32 Residential Universities Or Colleges In The Statewide SUNY System

Respondents' contention at pp. 22-23 of their brief, without any record support, that the sole reason for Petitioners to continue this case is because of their **counsels' "quest" for attorneys' fees** is absolutely untrue.

The only time the counsel fee issue has ever surfaced in this case was at Oral Argument in the Second Circuit on December 16, 1993. Respondents' counsel was perceptively questioned by Judge John M. Walker,

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3 *Princeton University v. Schmid*, 455 U.S. 100 (1982), involved a certiorari petition to this Court by Princeton University (as a private intervenor in a criminal indictment for trespass against a defendant handing out political handbills). Princeton's interest in seeking certiorari was to protect its right to keep trespassers off its campus.

After the incident, which prompted the arrest and conviction of the defendant, the University **substantially changed its regulations.** In declining to accept jurisdiction, this Court, in a per curiam opinion, stated, in commenting on the substantially amended regulations governing solicitation, that

> the issue of the validity of the old regulation is moot, for this case has "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract questions of law."

Id. at 103 (quoting *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam)).

Jr.[4] as to why (as pointed out on p. 28, fn. 15 of Petitioners' brief) Respondents had taken such a "rigid position" in not modifying that part of its unconstitutional regulation, still in effect, that this Court ruled six years ago clearly violated the students' pure free speech rights regarding their contacts with doctors, lawyers, tutors, etc.[5]

SUNY's counsel, in response to the Court's questioning, all but conceded that their real motivation in not amending their offensive regulation -- and in seeking to block Petitioners' efforts to amend and correct the mootness issue -- was to avoid the state's liability to Petitioners for counsel fees. (*See* Petition for Writ of Certiorari, p. 28, fn. 15).

The Students' Strong Desire To Have These Issues
Finally Resolved On The Merits

As far as the students are concerned, the fact of the matter is that counsel's efforts in the last six years since this Court's decision have been assiduously, conscientiously and solely focused on representing their clients to obtain the relief that prompted Petitioners to bring this action in the first instance (and later joined by a number of additional representative students) to vindicate:

- their first amendment rights in their unrestricted right to the use of their dormitory rooms; and

- their rights as visitors to go to other dormitory rooms on campus to enjoy their first amendment rights.

As is clear from the Affidavits in Support of the June 22, 1991 Amended Complaint (J.A. 454-67) filed by the seven students, as officers or as holding key positions in student government at their respective campuses, their joining this action was to insure that they and **"other students in the same**

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4 Opposing counsel at p. 23, fn. 6 of their brief is quite correct that it was Judge John M. Walker, Jr., and not Judge Ralph K. Winter, who sat on the panel and questioned SUNY's counsel. We wish to correct this error and apologize for our mistake.

5 *Fox v. SUNY*, 492 U.S. 469, 480-85 (1989), Opinion for the Court by Mr. Justice Scalia.

situation" would have the full enjoyment of their same first amendment speech rights.[6]

Finally, as an indication of the **continuing interest** of the Petitioners to have their constitutional rights vindicated, see the Affidavits of James B. Cullen of November 1, 1993 and the Affidavits of four additional intervenors filed as part of Petitioners' 1993 Motion to Supplement the Record before the court below.[7]

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6 See, for example, the Affidavit signed by William F. Weitz, a student at the University of Albany campus, who as of June 1991, was serving as the elected president of the Student Government at the Albany campus. There, he stated as follows:

> 5. I desire to have the right, without interference or censorship by defendants to invite a business invitee of my choosing to my dormitory room, or alternatively, to host and/or attend in the privacy of my own or another student's dormitory room, a meeting to discuss with a business invitee such topics as the students, in the exercise of their own free choice decide to participate in. Without limitation to the foregoing, I desire to have the right to hear and/or attend a meeting with a job counselor, doctor, lawyer, tutor, stockbroker and/or a representative of American Future Systems, Inc.
>
> 6. It is my belief that the policies of my school violate my constitutional rights and I want to become a plaintiff in this case to insure that **I and other students in the same situation** will have the full enjoyment of our same First Amendment speech rights.

See J.A. 472-74 (emphasis supplied).

7 On November 3, 1993, counsel for the Student/Plaintiffs filed a Motion with the Clerk of the Second Circuit Court of Appeals to Supplement the Record. This Motion contained, *inter alia,* all of the affidavits above referred to. The Motion to Supplement the Record was granted subject to reconsideration by the panel as a matter of administrative convenience.

While the Court in its Opinion (*see* Petition for Certiorari at 21a - 22a decided to change its position on the Motion, it did however consider the affidavits on their merits and ruled "in any event, consideration of the affidavits would not affect the outcome of this case. They merely show that several of the plaintiffs have expressed an intention to return to the SUNY system."

(continued...)

- James B. Cullen indicated that he definitely plans to go back to a SUNY campus to complete his missing credits for graduation; and when he does, he wants to be sure that he could "as an invitee of another student, freely exercise my free speech constitutional rights within the privacy of another student's room on campus to which I am invited."

- In the same Affidavit, he stated that he wanted "very much to see that the important issues we raised in this case are finally resolved, and in our favor, to vindicate the positions which I and my fellow students took in bringing this action in the first instance."

- The remaining other four Student Plaintiffs (after reaffirming their same interests to have the case that they started resolved, and to insure their rights on campus as future visitors) express **their continuing interest** to have this case resolved on its merits because as alumni, they have a "continuing pride and interest in helping to uphold and enhance the reputation of 'our university' to be known and respected as one that encourages and protects free discussion."[8]

7(...continued)

Here, these affidavits are offered:

- to show the continuing interest of the Student/Plaintiffs;

- to effectively rebut SUNY's contention that the sole reason for this case continuing on is because of the lawyers' quest for fees; and

- to demonstrate, as pointed out above, that the students had brought this case in both an individual and a representative capacity.

8 Paragraph Third of the students' affidavit reads in its entirety as follows:

> As graduates and members of the alumni of the various campuses of SUNY which we have attended, we have a continuing pride and interest in helping to uphold and enhance the reputation of "our university" to be known and respected as one that encourages and protects free discussion, and particularly the rights of its students and their invitees to listen to and participate in constitutionally protected free or commercial speech.

Representative Action
(see also Petition for Writ of Certiorari, p. 25-26)

Respondents' brief at pp. 14-17 disparages Petitioners' contention, as was permitted in *Brandon v. Board of Education*, 635 F.2d 971 (2d. Cir. 1980), *cert denied*, 454 US 1123 (1981), discussed in the Petition at p. 22, that this action was brought as a representative action, albeit it was not certified as such, for reasons stated in the Petition at p. 26 and fn.12.

Respondents' brief then quotes out of context at p. 15, fn. 5 certain phrases by some of the Petitioners to document Respondents' contention that the Petitioners were suing solely on their own behalf.

Any doubt as to the fact that these students were suing both for themselves and **others similarly situated** is unequivocally established by the references above to the Petitioners' affidavits of 1991 and 1993 and footnotes 6, 7 and 8 above.

Furthermore, Respondents' brief, not surprisingly, conveniently ignores and fails to quote from other extensive testimony that was presented, without any objection by Respondents, to establish that the Petitioners were elected student government representatives who viewed the case as a student's rights case and became involved because it was significant to the students they represented. (J.A. 261-64).

For example, Petitioner Philip Botwinik testified that "he was very active in the student government at [SUNY] Albany and became involved in the case after he was approached by the then president-elect of the student government, Stephen Gawley, another plaintiff in the case. Botwinik stated that he became involved in the case because he believed that

> the rights, the constitutional rights of students should be upheld. And this case I believe depicts an issue that is of grave importance to many students living in the dorms and outside the dorms. (J.A. 264)

Finally, Respondents at p. 11 cite *Cook v. Colgate University*, 992 F.2d 17 (2d Cir. 1993) as part of a string cite for the proposition that "graduation of plaintiffs 'before the district court's order can affect them,' rendered case moot." What Respondents fail to point out, however, is that

- Plaintiffs, in that case and **unlike this case, were asserting individual damage claims**; and were not suing in a representative capacity; and

- there was no argument or showing, as here, that the plaintiffs might return to Colgate.

Circuit Judge McLaughlin went on to point out that the case would not be moot if, as here, the plaintiffs had sued in a representative capacity. *Id.* at 20.

4. Examples Of Other Instances Where SUNY Totally Ignores Compelling Arguments Why This Court Should Grant:

¶ Certiorari; Or Alternatively,

¶ Summary Disposition As Noted In Student/Plaintiffs' Petition for Writ of Certiorari

As noted at the outset of this Brief, neither time nor space permits a page by page documentation of all the points and cases developed in the Petition that the SUNY Brief totally ignores and fails to discuss.

Most of them have already been pointed out above. However, several additional ones that SUNY ignores should at least be noted, such as:

- This Court's resources should not be wasted once this Court accepts jurisdiction. *See* Petition for Writ of Certiorari, pp. 23-24.

- The three Judicial Considerations detailed on p 27 of the Petition include:

  - Squandering judicial resources

  - Needless expense of class action -- including the arguments advanced on p. 26 and in fn. 12 of the Petition as to why a class of plaintiffs not seeking individual damages should be able to litigate a representative action, without resort to the cumbersome and expensive procedural device of class action certification.

- Undermining public confidence in the will and ability of the judicial system to act fairly, decisively and without undue delay.

- The discussion in the Petition at p. 27 and fn. 13 concerning the important public policy considerations underlying Fed. R. Civ. P. 15(a) and 21.

And last, but by no means least, is the failure of SUNY to respond to the suggestion in the Petition at p. 30, fn. 16 regarding **two alternatives for Summary Disposition by this Court.** Clearly, this Court has the power to so act.

Considering the extraordinary delays in the thirteen year history of this case, such action would fulfill the goals set by this Court to avoid needless waste of judicial resources and expense and delay to the parties, as articulated in:

- *Mullaney v. Anderson* (see Petition p. 27 and this Brief above at pp. 6-7);

- *Newman-Green, Inc. v. Alfonzo-Larrain* (see this Brief above at p. 7); and

- Mr. Chief Justice Rehnquist's concurrence in *Honig v. Doe* cautioning against "squandering the unique resources of time spent by this Court on briefs, oral argument and conferencing." *See* Petition, p. 23-24.

CONCLUSION

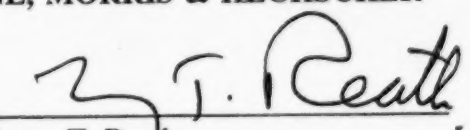
For the foregoing reasons, Petitioners respectfully pray that this Court:

- Issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, or alternatively

- Order summary disposition of this matter and direct the Court below to remand with leave to the Petitioners to amend their Complaint to join new Student/Plaintiffs under Fed. R. Civ. P. 15(a) and 21; and forthwith resolve the open issues in accordance with this Court's remand order in its opinion in this case.

Respectfully submitted,

DUANE, MORRIS & HECKSCHER

By: 

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